

Rule 612. Writing Used to Refresh a Witness's Memory.

(a) **Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

- (1) while testifying; or
- (2) before testifying, if the court decides that justice requires the party to have those options.

(b) **Adverse Party's Options; Deleting Unrelated Matter.** An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) **Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial.

Comment to 2012 Amendment

The language of Rule 612 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Comment to Original 1977 Rule

Subparagraphs (1) and (2) of Federal Rule 612 have been reversed in order to clarify the intent of the rule which is to invoke the court's discretion concerning matters used before testifying and to have production as a matter of right of materials used while testifying. The word "action" in the second sentence of the rule replaces "testimony" in the Federal Rule to accord with the broader scope of cross-examination used in Arizona.

Cases

612.010 When a witness does not remember making a particular statement, a party may use a writing to refresh the witness's memory for the purpose of testifying.

State v. Ortega, 220 Ariz.320, 206 P.3d 769, ¶¶ 30–33 (Ct. App. 2008) (victim's brother saw defendant molest victim; when called to testify, brother did not remember many details of events or his statements to police detective; trial court properly allowed state to read to brother excerpts from his interview with police, whereupon he remembered telling detective that defendant threatened him if he told anyone what had happened).

612.020 In order to use a writing to refresh a witness's recollection, all that is required is that the writing serves to revive the independent recollection of the witness.

State v. Hall, 18 Ariz. App. 593, 596, 504 P.2d 534, 537 (1973) (defendant charged with receiving stolen property; even though witness could not read or write English, witness could recognize his signature and certain numbers, thus trial court did not err in allowing witness to refresh his recollection with one of defendant's written records).

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612.030 In order to refresh a witness's recollection with a recording, the witness should listen to the recording outside of the presence of the jurors; if the witness's recollection is refreshed, the witness may then testify; if the witness's recollection is not refreshed, the party may then seek to have the recording admitted under Rule 803(5).

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 8 & n.2 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; to extent trial court allowed tape to be played in presence of jurors, trial court erred, but because recorded statement impeached her testimony, any error in playing of recording was harmless).

612.040 If a party allows a witness to refresh the witness's memory with a writing protected by a privilege, the party waives the privilege and the other party will have the right to have produced those portions of the writing that could have had an influence on the witness's testimony.

Samaritan Health Serv. v. Superior Ct., 142 Ariz. 435, 438, 690 P.2d 154, 157 (Ct. App. 1984) (defendant's attorney allowed witnesses to refresh their memories with interview summaries containing impressions and thought processes as well as factual matters; court held defendant's actions waived attorney-client and work product privileges for those portions of writings that could have had influence the witnesses's testimony).

612.050 A party may not use inadmissible evidence to refresh a witness's memory.

Tuzon v. MacDougall, 137 Ariz. 482, 489, 671 P.2d 923, 930 (Ct. App. 1983) (petitioner asked witness whether polygraph examination had been arranged for him; when witness answered no, petitioner sought to use newspaper article that had not been marked as exhibit, stating he wanted to refresh witness's recollection; court held trial court did not err in ruling that newspaper article was hearsay and that it could not be used for impeachment).

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